(2)

No. 06-685

In the Supreme Court of the United States

ARTHUR W. FUESTING,

Petitioner,

v.

ZIMMER, INC.,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

DAVID STEVENS
Counsel of Record
BRENT D. HOLMES
JASON M. CROWDER
Attorneys
HELLER, HOLMES & ASSOC., P.C.
1101 BROADWAY, P.O. BOX 889
MATTOON, IL 61938-0889
(217) 235-2700

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

Introduction 1

Reasons for Granting the Writ 2

I. The Seventh Circuit and Respondent have disregarded this Court's direction in *Cone, Johnson, Glove Liquor Co.*, and now *Unitherm* . 2

II. The Eleventh Circuit has applied *Unitherm* differently from the First and Ninth Circuits . . . 5

III. The district court must be allowed to first correct mistakes in all circumstances 8

Conclusion 9

TABLE OF AUTHORITIES

Page

Cases

Barnes v. Rivas,
2006 WL 3334583 (5th Cir. Nov. 17, 2006) 6

Calton v. City of Garland,
170 Fed. Appx. 338 (5th Cir. Mar. 8, 2006) 6

Clark v. Newport News Shipbuilding & Dry Dock Co.,
937 F.2d 934 (4th Cir. 1991) 5

Cone v. West Virginia Pulp & Paper Co.,
330 U.S. 212, 67 S.Ct. 752,
91 L.Ed 849 (1947) . . . . . *passim*

Elmore v. U.S.,
843 F.2d 1128 (8th Cir. 1988) 4, 5

First United Pentecostal Church v. Guideone Specialty Mut. Ins. Co.,
189 Fed.Appx. 852 (11th Cir. Jun. 28, 2006) 6

Fuesting v. Zimmer,
448 F.3d 936 (7th Cir. 2006) 34, 6

Globe Liquor Co. v. San Roman,
332 U.S. 571, 68 S.Ct. 246,
92 L.Ed 177 (1948) 2, 3, 5, 9

Hamilton v. Leavy,
2006 WL 3203920 (3d Cir. Nov. 7, 2006) 6

Hi Limited Partnership v. Winghouse of Florida, Inc.,
451 F.3d 1300 (11th Cir. 2006) 6, 7

Johnson v. New York, N.H. & H.R. Co.,
344 U.S. 48, 73 S.Ct. 125,
97 L.Ed. 77 (1952) 2, 3, 5, 8, 9

Mathis v. Exxon Corp.,
302 F.3d 448 (5th Cir. 2002) 4

McDonald v. Alpen House Ltd. Corp.,
183 Fed.Appx. 996 (11th Cir. Apr. 21, 2006) 6

Metcalf v. Bochco,
2006 WL 2472193 (9th Cir. 2006) 6, 7

Santos v. Posadas De Puerto Rico Assoc., Inc.,
452 F.3d 59 (1st Cir. 2006) 6

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,
___ U.S. ___, 126 S. Ct. 980,
161 L. Ed. 2d 974 (2006) . . . . . *passim*

Vazquez-Valentin v. Santiago-Diaz,
459 F.3d 144 (1st Cir. 2006) 6, 7

Rules

Federal Rule of Civil Procedure 50 . . . . . *passim*

Federal Rule of Civil Procedure 51 . . . . . 4, 7

Federal Rule of Civil Procedure 59 . . . . . *passim*

Fed. R. Evid. 103(a) Advisory Committee Notes, 2000 Amendment 4

Federal Rule of Evidence 103 . . . . . 1, 3, 4

INTRODUCTION

In his Petition for Writ of Certiorari, Petitioner Arthur W. Fuesting presented the question of whether a party's failure to file a Federal Rule of Civil Procedure 50(b) motion for judgment as a matter of law or a Rule 59 motion for a new trial following a jury verdict prevents that party from seeking a new trial on appeal where the appeal concerns alleged errors in the admission of evidence as it would if the appeal concerned the sufficiency of the evidence. He argued that it did, and that this Court's decision in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, ___ U.S. ___, 126 S. Ct. 980, 163 L.Ed.2d 974 (2006), mandates that result. He further argued that the circuit courts of appeal were divided on the issue, with the Seventh, First, and Ninth Circuits deciding the matter erroneously and the Eleventh Circuit deciding it correctly. He prayed this Court to grant certiorari and vacate the Seventh Circuit's opinions in this matter and remand the cause with instructions to the Seventh Circuit to summarily affirm the jury verdict, or alternatively to dismiss the appeal.

In its Brief in Opposition, Respondent asserted the question presented was when the court of appeals awarded the remedy of new trial for an evidentiary error that was preserved for appeal by the district court's definitive ruling on a motion *in limine*, did it misapply *Unitherm*? Respondent asserted the Seventh Circuit did not, and argued that under Federal Rule of Evidence 103 the pre-trial ruling on the *motion in limine* properly preserved the matter for appeal. It further argued that *Unitherm* only applies to appeals based upon the insufficiency of the evidence, and no conflict among the circuits exists. Respondent asked this Court to deny the Petition.

Respondent's assertions and arguments are erroneous, and this Court should grant the Petition in order to resolve an important, recurring question of trial procedure and appellate review upon which the circuit courts of appeals are sharply divided.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit and Respondent have disregarded this Court's direction in *Cone, Johnson, Globe Liquor Co.*, and now *Unitherm.*

Respondent, in the Brief in Opposition to Certiorari, has argued the Seventh Circuit correctly applied *Unitherm.* The largest flaw in the argument is the failure to address the pre-*Unitherm* cases of *Cone, Johnson,* and *Globe Liquor Co. Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed 849 (1947); *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952); and *Globe Liquor Co. v. San Roman,* 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed 177 (1948).

Cone, Johnson, and *Globe* represent the pre-*Unitherm* view of this Court on the relationship between post-verdict motions and a reviewing court's ability to either grant a new trial or direct a judgment. These cases have not been overruled. As binding authority, the trio of cases should have not only been considered by the Seventh Circuit in issuing an opinion regarding a new trial, but also by the Respondent in response to the Petition for Certiorari.

In his Petition for Certiorari, Petitioner has clearly delineated the principles set forth in each of these pre-*Unitherm* cases. *Cone* is factually comparable and must not be ignored. In *Cone,* this Court found it was unable to order

the lower court to direct a verdict where the party had failed to file post-verdict motions. *Cone,* 330 U.S. at 218. As in this case, the issue on appeal was admissibility, not sufficiency, of the evidence. *Id* at 214. These principles were later reiterated and applied in *Johnson,* a sufficiency of the evidence case, and *Globe Liquor, Co,* a case involving the exclusion of deposition testimony. *Johnson,* 344 U.S. at 49; *Globe Liquor, Co.,* 332 U.S. at 573. These three cases represent this Court's clear instruction that the courts of appeals are without power to order a new trial post-verdict in the absence of a Rule 50(b) or 59 motion. Thus, it is unreasonable, after considering this Court's prior directives on post-verdict motions, to champion such a narrow interpretation of Rule 50(b) and Rule 59 without an attempt to either distinguish or diminish the importance of *Cone, Globe Liquor, Co.,* and *Johnson.*

This Court, in *Unitherm*, a sufficiency of the evidence case, applied *Cone*, an admissibility of the evidence case, and held a new trial, in addition to directed judgment, is not available where the party failed to make a Rule 50(b) or Rule 59 motion. 126 S.Ct. at 985-987, 989. *Unitherm* in no way overrules or abrogates the *Cone, Globe Liquor Co.,* and *Johnson* trio. Instead of discussing the trio of binding Supreme Court cases, which speak directly to the issue of post-trial motions, Respondent opted to discuss the Federal Rules of Evidence and the holdings of various courts of appeals.

As the basis for their argument, both the Seventh Circuit and Respondent have inquired as to the relationship between Federal Rule of Evidence 103 and Federal Rules of Civil Procedure 50 and 59. See *Fuesting v. Zimmer,* 448 F.3d 936, 940 (7th Cir. 2006). Evidentiary or procedural rules, which pertain to preservation of error, and procedural rules, which

operate as prerequisite steps to appeal, must not be confused. The relevant part of Federal Rule of Evidence 103 comes from part (a) and states: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Fed. R. Evid. 103(a). As stated in the Petition for Certiorari, this portion of the rule was enacted to dispel uncertainty in trial procedure. Fed. R. Evid. 103(a) Advisory Committee Notes, 2000 Amendment. The amendment provided a uniform rule that once a court had made a definitive ruling on evidentiary issues, an additional objection was not required in order to preserve the issue. *Id*; See also *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 (5th Cir. 2002). Once the issue is preserved, meaning it has been objected to in a timely and proper manner consistent with the Rules of Evidence, parties to litigation are not relieved of the procedural prerequisites to appeal set forth in the Rules of Civil Procedure. Through the combined holdings in *Unitherm* and *Cone,* this Court held a necessary prerequisite to appellate relief, meaning a new trial or directed judgment, is a Rule 50(b) or Rule 59 post-verdict motion. *Unitherm,* 126 S.Ct. at 987; *Cone,* 330 U.S. at 218.

In addition to 103 of the Federal Rules of Evidence and 51 of the Federal Rules of Civil Procedure, Respondent cites to cases pertaining to the preservation of evidentiary objections in order to distract the Court's attention from the trio, now quartet, of cases with *Unitherm.* For example, Respondent cites *Elmore v. U.S.* concerning jury instruction error preservation. See *Elmore v. U.S.*, 843 F.2d 1128, 1131-1133 (8th Cir. 1988) and Respondent's Brief in Opposition to Petition for Writ of Certiorari, p.6. In *Elmore,* the court of appeals found the objection to the jury instruction had been preserved for appeal by compliance with Fed. R. Civ. P. 51. *Id* at 1133. It is also important, however, to note the party

seeking appeal moved for judgment notwithstanding the verdict in order to comply with the procedural requirements set forth in Rule 50(b). *Id* at 1131. Respondent does not account for the subtle difference between preserving claims of error through timely and appropriate objections and exercising the proper procedural prerequisites of first seeking the appropriate relief at the trial level prior to an appeal.

In the trio of cases, as reiterated in *Unitherm,* this Court has clearly drawn the line between procedural prerequisites to relief and preservation of error. In direct disregard, Respondent cites to now irrelevant authorities, which were decided prior to the unmistakable pronouncement in *Unitherm* in 2006. *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934, (4th Cir. 1991); *Elmore v. U.S.*, 843 F.2d 1128 (8th Cir. 1988); and *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714 (7th Cir. 2003). In *Chemetall GMBH v. ZR Energy, Inc.*, cited for the proposition that errors of law are reviewable without post-trial motions, even the Seventh Circuit, stated "prudent counsel would do well to preserve the issue in a Rule 50 motion." *Id* at 720. The Seventh Circuit has misapplied *Unitherm,* disregarded this Court's prior holdings in *Johnson, Cone,* and *Globe Liquor Co.*, and used preservation of error to ignore the procedural requirements of the Rules of Civil Procedure. Certiorari is necessary to remove the lingering doubt created by the holding of the Seventh Circuit and to halt the incorrect application of the rule in this and later cases across the circuits.

II. The Eleventh Circuit has applied *Unitherm* differently from the First and Ninth Circuits.

Respondent denies a split in the circuits. Respondent cites to numerous cases arguing many courts of appeals have applied *Unitherm* consistent with the Seventh Circuit's interpretation

in *Zimmer*. See *Zimmer*, 448 F.3d at 936 and Brief in Opposition to Petition for Writ of Certiorari, p. 9-10. In each of the cited cases, *Unitherm* was applied to reject sufficiency of the evidence review where a party had failed to make a Rule 50(b) motion. The cases are also inapplicable because the courts of appeals affirmed the lower courts' rulings instead of granting relief not yet sought at the district level. See *Santos v. Posadas De Puerto Rico Assoc., Inc.*, 452 F.3d 59, 66 (1st Cir. 2006); *Barnes v. Rivas*, No. 05-41436, 2006 WL 3334583, *1 (5th Cir. Nov. 17, 2006)(unreported); *Hamilton v. Leavy*, No. 05-2059, 2006 WL 3203920, *1 (3rd Cir. Nov. 7, 2006)(unreported); *Calton v. City of Garland*, No. 05-10364, 170 Fed. Appx. 338, *1 (5th Cir. Mar. 8, 2006); *First United Pentecostal Church v. Guideone Specialty Mut. Ins. Co.*, No. 05-12398, 189 Fed.Appx. 852, *3 (11th Cir. Jun. 28, 2006)(unreported); and *McDonald v. Alpen House Ltd. Corp.*, No. 05-15904, 183 Fed.Appx. 996, 996-97 (11th Cir. Apr. 21, 2006)(unreported).

The cases most relevant to the issue are *Vazquez-Valentin v. Santiago-Diaz*, *Metcalf v. Bochco*, and *Hi Limited Partnership v. Winghouse of Florida, Inc.* See *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144 (1st Cir. 2006); *Metcalf v. Bochco*, 2006 WL 2472193, * 1, n.1 (9th Cir. 2006)(unpublished); and *Hi Limited Partnership v. Winghouse of Florida, Inc.*, 451 F.3d 1300 (11th Cir. 2006). The issue, in these cases, as well as the present case, is whether *Unitherm* applies to preclude an appeal based upon something other than the sufficiency of the evidence. The cases, to which Respondent cites, are irrelevant.

Petitioner recognizes the First and Ninth circuits have interpreted *Unitherm* consistently with the Seventh Circuit. See *Vazquez-Valentin*, 459 F.3d at 149-152; and *Metcalf*, 2006 WL 2472193 at * 1, n.1. Both circuits interpret

Unitherm to mean a party's failure to renew a Rule 50 motion bars only sufficiency of the evidence review. *Metcalf*, 2006 WL 2472193, *1, n.1; *Vazquez-Valentin,* 459 F.3d at 149-152. The 11th Circuit, however, has interpreted *Unitherm* differently in *Hi Limited Partnership*.

Respondent contends *Hi Limited Partnership* does not create a split in the circuits. See Brief in Opposition to Petition for Writ of Certiorari, p. 9. By basing the argument upon Rule 51 of the Federal Rules of Civil Procedure, Respondent again confuses a procedural deficiency, failure to seek at the district level first that relief which is now sought at the appellate level, with a preservation deficiency, failure to assert a timely objection to errors in jury instruction. A brief review of the *Hi Limited Partnership* opinion reveals that Rule 51 was not the basis for the 11th Circuit's dismissal. See *Hi Limited Partnership,* 451 F.3d at 1301-1302. In fact, the dismissal was based solely upon the party's failure to file a post-verdict motion. *Id.*

Most importantly, the alleged error in *Hi Limited Partnership* was a legal error separate and apart from the sufficiency of the evidence. *Id* at 1301. The Eleventh Circuit cited specifically to this Court's holding in *Unitherm* and deemed the claim precluded from review in the absence of a post-verdict motion. *Id* at 1301-1302. The court highlighted *Unitherm* as the Supreme Court's clarification that Rule 50 does "not permit *any* relief under such circumstances." *Id* at 1302. Ultimately, the Court had no authority to consider an appeal, based on legal error, where the appealing party failed to file a post-verdict motion under either Rule 50(b) or Rule 59. *Id.*

There is a conflict among the circuits. Courts in different Circuits apply *Unitherm* in opposite ways. Federal procedure,

specifically Rules 50 and 59 of the Federal Rules of Civil Procedure, must be uniformly applied to ensure the effective administration of justice. This Court should grant the Petition for Writ of Certiorari to resolve the conflict and clarify an important and recurring area of the law.

III. The district court must be allowed to first correct mistakes in all circumstances.

In *Cone,* an appeal based upon the admissibility of evidence similar to this case, this Court expressed a preference for requiring parties to seek relief first from the district court before being allowed to seek any relief from the appellate court. *Cone,* 330 U.S. at 215-216. Respondent contends the district court should only be afforded the opportunity to correct its own mistakes where the claim of error is based upon the sufficiency of the evidence. See Brief in Opposition to the Petition for Writ of Certiorari, p. 12. Again, Respondent has ignored this Court's discussion in *Cone.*

In *Cone*, this Court discussed a practical reason for requiring a party to seek relief first from the district court. The district court should be given a chance to exercise its discretion in ruling on a Rule 50(b) motion because the district judge should be "afforded a 'last chance to correct his own errors without delay, expense, or other hardships of an appeal.'" *Cone,* 330 U.S. at 216 (citing to *Greer v. Carpenter,* 323 Mo. 878, 882 (1929) and *Johnson,* 327 U.S. at 112). *Cone* did not draw the distinction the Respondent asserts nor does *Unitherm* limit the application of these policies to sufficiency of the evidence review. Instead, *Unitherm* cites specifically to *Cone*, an appeal based on the admissibility of evidence, for the policies behind first seeking the district court's input. The Seventh Circuit has acted in

direct contravention of the policy set forth by this Court in *Cone*.

CONCLUSION

The question in this Petition presents an important and recurring issue of federal law. Petitioner submits this Court should articulate clear guidelines for the application of Rule 50(b) and Rule 59, where the alleged error is admission of evidence. The circuit courts of appeals have failed to adhere to the principles of law handed down by this Court in *Cone, Globe Liquor Co., Johnson,* and now *Unitherm*. The Seventh Circuit has ruled in contravention of the law and policies in *Cone,* and in a manner which allows the appellate court to grant relief never before sought at the district level.

In addition to being precluded from reviewing a claim based upon the admissibility of the evidence, the Seventh Circuit is barred from reviewing any other claims of error previously asserted at the appellate level due to the party's failure to make a Rule 50(b) or Rule 59 motion. Without a post-verdict motion, the Seventh Circuit has no power to grant relief of a new trial to Respondent where no such relief was sought post-verdict in the district court, as required procedurally. This Court should vacate the Seventh Circuit's opinions in this case and remand the cause with instructions to the Seventh Circuit to summarily affirm the jury verdict, or alternatively dismiss Respondent's appeal.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

David Stevens
Counsel of Record for Petitioner
Brent D. Holmes
Jason M. Crowder
Attorneys for Petitioner

December 28, 2006.